(1)

No.

In The
Supreme Court of the United States

YURI J. STOYANOV,
Petitioners

v.

DONALD C. WINTER,
SECRETARY OF THE NAVY; ET. AL.,
Respondents.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

Yuri J. Stoyanov
7560 Pindell School
Road
Fulton, MD 20759
(301) 604-7615

QUESTIONS PRESENTED FOR REVIEW

Petitioner seeks decision to vacate the appeals court decision, which did not address any issue raised by Petitioner, but sanctioned wrong district court opinions that conflict and so far depart from this Court's decisions and decisions of the appeals courts as to call for an exercise of this Court's supervisory power. The conflicting and wrong reasons stated in the district court opinion and the appeals court decision present the following questions:

1. Whether Petitioner could establish a *prima facie* case of age discrimination based upon promotion selections?

2. Whether presenting evidence of disparate treatment and a pattern or practice of intentional discrimination because of age and retaliations for protected activities in addition to refuting Defendants' contentions are sufficient to defeat summary judgment.

3. Whether Petitioner provided sufficient evidence to establish pretext to defeat summary judgment?

LIST OF PARTIES

YURI J. STOYANOV,
Petitioner,
v.
DONALD C. WINTER, Secretary of the Navy;
STEPHAN W. PETRI, individually and in his official capacity as Head of Carderock Division Naval Surface Warfare Center;
GARY M. JEBSEN, individually and in his official capacity as Head of Code 70, Carderock Division Naval Surface Warfare Center;
KEVIN N. WILSON, Individually and in his Official Capacity as the Acting Head of Code 74 Carderock Division;
JAMES H. KING, Individually and in his Official Capacity as the Head of Code 74 Carderock Division;
JOHN C. DAVIES, Individually and in his Official Capacity as the Deputy Head of Code 74 Carderock Division;
MATHEW CRAUN, Individually and in his Official Capacity as the Head of Code 722 Carderock Division;
PAUL SHANG, Individually and in his Official Capacity as the Head of Code 72 Carderock Division;
GERALD SMITH, Individually and in his Official Capacity as Deputy Head of Code 70 Carderock Division;
ROGER FORD, Individually and in his Official Capacity as the Head of Code 7014 Carderock Division;
M. KATHLEEN FOWLER, Individually and in her Official Capacity as Administrative Officer Code 709;
DAVID CARON, Individually and in his Official Capacity as Assistant Counsel Code 39;
JOSEPHINE MCGRATH, Individually and in her Official Capacity as Complaints Manager/Acting Deputy EEO Chief Code 034.

Respondents

CERTIFICATE OF INTEREST

The Petitioner Yuri Stoyanov certify the following:

1. The full name of every party or amicus represented by us is: None
2. The name of the real party in interest represented by us is: None
3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by us are: None
4. There is no such corporation as listed in paragraph 3
5. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by us in the trial court or agency or are expected to appear in this court are: None

04/07/09 — Date

Yuri Stoyanov — Yuri Stoyanov

TABLE OF CONTENTS

Cases

OPINIONS BELOW

1. U.S. Court of Appeals for the Fourth Circuit, Docket No. 08-2040, (1:06-cv-01244-AMD) Judgment January 15, 2009,. (Appendix page A1)

2. U.S. Court of Appeals for the Fourth Circuit, Docket No. 08-2040, (1:06-cv-01244-AMD) Unreported January 15, 2009, Unpublished Per Curiam Opinion (Appendix p. A2)

3. U.S. District Court Order denying Plaintiff's Motion to Reconsider the August 11, 2008 Order and Amend the Judgment, dated August 27, 2008, Docket No. 06-01244-AMD (Appendix p. A4)

4. U.S. District Court Order and Judgment dated August 11, 2008, Docket No. 06-01244-AMD (Appendix p. A5)

5. U.S. District Court Memorandum Opinion dated August 11, 2008, Docket No. 06-01244-AMD. (Appendix p. A6)

JURISDICTION

The U.S. Court of Appeals for the Fourth Circuit issued Order denying timely petition for rehearing en banc on March 9, 2009 for Petitioner Yuri Stoyanov. The Supreme Court has jurisdiction in exercising its power of review of this matter pursuant to 28 U.S.C. 1253-1254. The jurisdiction of this Court is invoked under 28 U.S.C. §1254.

STATUTES INVOLVED IN THIS CASE

Age Discrimination in Employment act of 1967, 29 U.S.C. 621 et seq. ("ADEA"); Title VII of the 1964 Civil Rights Act, 42 U.S.C. 2000e et. seq. ("Title VII"); Whistleblower Protection Act, 5 U.S.C. 2302(b)(8) ("WPA"); 5 U.S.C. §§2301-2302; 42 U.S.C. §1983.

STATEMENT OF THE CASE

Petitioner Dr. Yuri Stoyanov submits for the Court's consideration and decision to vacate the appeals court decision, which sanctioned a decision by a lower court that conflicts and so far departs from this Courts' decisions as to call for an exercise of this Court's supervisory power. The appeals court for the fourth circuit did not address any issue raised by Petitioner, but sanctioned wrong and erroneous reasons stated in the district court opinions that conflict with the relevant decisions of this Court and decisions of other appeals courts. Facts presented below support Petitioner's cause because:

1) Petitioner has exhausted all administrative and legal remedies for intentional age discrimination and retaliations against Petitioner and his brother. As a last resort for legal remedies, Petitioner appeals to this Court to exercise supervisory power and restore justice because of clear evidence of age discrimination, intentional retaliations, and corruption of the process.

2) Petitioner works for the Navy as career appointment Scientist in the same Code 741, RF Technology Branch, since 1987. On February 4, 2002, both Petitioner Dr. Yuri Stoyanov and his brother Dr. Aleksandr Stoyanov filed first EEO discrimination complaints after promotion was denied to the ND-5 Branch Head Interdisciplinary Manager position in Code 741 in the most egregious act of intentional discrimination against Petitioner (DOB 4/7/1955, born in Russia) when a significantly younger (over 14 years) with far inferior qualifications Defendant Mr. Farley (DOB 5/16/1969, born in Kansas) was promoted by selecting official manipulating selection process.

3) Petitioner was also denied promotions and assignments to at least six ND-5 positions, which were filled without any vacancy announcements when other individuals with inferior qualifications were assigned to a position and secretly promoted under pretext of accretion of duties to cover up intentional age discrimination against Petitioner. The few positions competed through vacancy announcements were also filled by fraud and manipulations of vacancy announcements to deny Petitioner promotion. Petitioner was denied promotions and assignments to at least eleven (11) ND-5 positions while younger employees with inferior qualifications were promoted because of age discrimination against Petitioner by the second-level supervisor Defendant King who was about the same age as Petitioner and his brother Dr. A. Stoyanov.

4) Since February 4, 2002, after Petitioner filed first EEO discrimination complaint, Defendants immediately conspired to escalate discrimination and retaliations against Petitioner and changed Petitioner's work schedule on the same day as the EEO Counselor contacted Defendants on February 21, 2002.

5) One month later, after Petitioner filed formal EEO discrimination complaints in March 2002, Defendants again escalated discrimination and retaliations and by fraud transferred Petitioner Dr. Yuri Stoyanov to another technology department from the department where he worked for over fifteen years. Petitioner filed additional EEO discrimination complaints and reported violations of laws through the chain of Navy command and to US Office of Special Counsel (OSC) in May 2002.

6) Defendants escalated discrimination and retaliations against Petitioner for participation in prior EEO discrimination complaint activities and Whistleblowing. The individual Defendants conspired to deny Petitioner promotion to ND-5 position and retaliated against Petitioner by excluding Petitioner from managing projects, denied directly funded work, interfered with Petitioner's projects, redirected funding, imposed discriminatory requirements, used threats of disciplinary action, denied transfer, incentive pay, and promotion by intentionally denying request for vacancy announcements, concealing, failing to inform, post job announcements, and deceiving in an effort to conceal a promotion opportunity from the Petitioner.

7) Defendants failed to comply with laws and failed to implement the Navy policy of zero tolerance to discrimination in spite of the EEOC finding intentional discrimination against Petitioner's brother. As a result of agency's failure to comply with laws and the Navy policy, Defendants further escalated discrimination and retaliations against Petitioner. Petitioner filed over twenty additional EEO discrimination complaints since 2002, disclosed violations of laws, the Whistleblower Protection Act, abuse of authority through the chain of Navy command, and filed disclosures with the US Office of Special Counsel and appeals with the Merit Systems Protection Board.

8) In 2004, the EEO Commission Office of Federal Operations (EEOC-OFO) upheld found discrimination in the first EEOC case and ordered the agency to take appropriate disciplinary action against the responsible management officials. However, agency again failed to comply with laws

and implement the Navy policy of zero tolerance to discrimination.

9) In June 2005, Petitioner filed civil actions against the Defendants individually and in their official capacity to recover damages and restore justice because of egregious discrimination and violations of Petitioner's rights. Since formal EEO discrimination complaints were filed in 2002, there was no hearing on the crucial age discrimination claims of failure to promote, but the claims were dismissed without a hearing at the EEOC level. The age discrimination and retaliation claims for denied assignments and promotion in the district court were dismissed by summary judgment wrongly concluding "there is no basis in the record from which the court could infer that unlawful discrimination played a role in defendants' selection processes" in establishing the fourth element of the *prima facie* case for disparate treatment in promotion and ignoring clear evidence of age discrimination when significantly younger (by more than 9 years) selectee was promoted.

10) The U.S. Court of Appeals for the Fourth Circuit did not address any issue raised by the Petitioner's appeal but sanctioned wrong and erroneous reasons stated in the district court opinion based on Defendants' intentional material misrepresentations and deceptions. The appeals court decision contradicted its own decisions, decisions of other appeals courts and far departed from this Court's decisions as to call for an exercise of this Court's supervisory power to restore justice and issue a decision in favor of the Petitioner.

ARGUMENTS FOR ALLOWANCE OF THE WRIT

AGE DISCRIMINATION BASED UPON PROMOTION SELECTIONS

Petitioner appeals and presents compelling reasons to grant petition for a writ of certiorari based on the relevant decisions of this Court. In *Reeves v. Sanderson Plumbing Products, Inc, 530 U. S. 133, 140 (2000)*, this Court established what showing a plaintiff had to make regarding pretext in the age discrimination case and, specifically, whether a plaintiff could satisfy his burden by merely rebutting the defendant's explanation for the action. The appeals court for the fourth circuit also had applied the *Reeves* methodology to allow a plaintiff to survive summary judgment and sustained a jury verdict for plaintiff in the failure to promote case. See *Dennis v. Columbia Colleton Med. Ctr., Inc.*, 290 F.3d at 649-50 (4th Cir. 2002). The appeals court held that "the *Reeves* formulation operates based on "the strength of the prima facie evidence in creating an inference of discrimination." *Id* at 648. Petitioner presented ample evidence to defeat Defendants' motion for summary judgment and clearly established an inference of intentional discrimination and retaliations for claims of denied promotions and assignments leading to promotion.

The district court, however, abused discretion and far departed from the accepted decisions of the appeals courts by concluding in the Memorandum Opinion at A11 footnote 3: "Moreover, as to Vacancy Announcement CAR 02-0074, plaintiff was not considered because he failed to indicate an interest in the position in the proper manner," which clearly contradicted and far departed from the appeals court

decision made in *Mauro v. Southern New England Telecomms.*, Inc., 208 F. 3d at 387 (2d Cir. 2000): "requiring the plaintiff to show that he or she applied for the specific jobs at issue would be unrealistic as an employee by definition cannot apply for a job that he or she does not know exists". Moreover, Petitioner presented direct evidence that Defendants deceived or misled Petitioner about the VA CAR 02-0074 in an effort to conceal a promotion opportunity and to deny Petitioner promotion as part of continuous discrimination on bases of age, national origin and in reprisal for participation in protected activities. As the direct evidence of intentional discrimination, desperate treatment, and retaliation against Petitioner showed, Defendant Fowler provided information about the VA CAR 02-0074 to the 38-years old selectee while on the very same day denied such information to the 47-years old Petitioner by explicitly telling Petitioner "to request this type of information" from EEO office "since you have an ongoing EEO case" when the selectee and Petitioner requested information about the available vacancy announcements. In addition, Defendant Fowler deceived or misled the EEO office that there was no vacancy announcement in an effort to conceal a promotion opportunity from Petitioner.

The appeals court sanctioned a departure of the lower court from accepted decisions that was in conflict with the court's own decision in *Williams v. Giant Food Inc*, 370 F.3d 423 (4th Cir. 2004), which reversed the district court's summary judgment concluding that *Williams* created a genuine issue of material fact relevant to her failure-to-promote claims and can establish a *prima facie* case if she can show that she was unaware of the promotion

opportunities because the company did not follow its own policy.

Furthermore, Petitioner clearly established strong *prima facie* case of age discrimination and retaliation in this case. In fact, the EEO Commission found that Petitioner "established a prima facie case of age, national origin and reprisal discrimination" for most of the Petitioner's claims. However, the district court abused discretion and far departed from the accepted decisions of the appeals court by ignoring evidence for the fourth elements of a *prima facie* case and concluding in the Memorandum Opinion at A12 (see Appendix): "there is no basis in the record from which the court could infer that unlawful discrimination played a role in defendants' selection processes" contrary to the direct evidence of desperate treatment and the clear evidence of intentional age discrimination when Petitioner specifically challenged the selection process since the position was filled by a significantly younger (more than 9 years) selectee who did not participate in protected activities. The appeals court did not address the issue of intentional age discrimination and retaliations, but sanctioned a departure of the lower court from the accepted decisions that call for an exercise of this Court's supervisory power.

The district court further abused discretion and far departed from the accepted decisions by concluding in the Memorandum Opinion at A12: "even assuming that plaintiff had established a *prima facie* case, he cannot refute the legitimate, non-discriminatory explanations defendants have offered for their appointments" clearly contradicting undisputed evidence that Petitioner was the most qualified with a Ph. D. in physics and over 16 years

of experience in the technology required for the position while significantly younger selectee had no such qualifications and experience and, in fact, the selectee admitted that her technical background was not strong enough for a promotion and she did nothing to strengthen her technical background. Furthermore, the district court abused discretion by concluding in the Memorandum Opinion at A12: "[i]n sum, Stoyanov urges the court to substitute its judgment, or more accurately Stoyanov's, for that of his employer on no more basis than plaintiff's own assertions that he is the most qualified candidate," clearly contradicting the evidence presented and making a decision about a question of fact for the jury, which could return a verdict in favor of Petitioner. The district court far departed from the accepted decision of this Court recent finding that an employee's claimed superior qualifications for the position sought could show that the employer's articulated reasons were pretextual. See *Ash v. Tyson Foods, Inc., 126 S. Ct. 1195* decided on February 21, 2006.

In addition, Petitioner presented direct evidence of the selecting official's discriminatory attitude based on Petitioners' age. The direct evidence of discriminatory attitude expressed in the email of the selecting official 46-years old Defendant King about "real paucity of employees in the 26 to 36 year age bracket," distress for being above the average age of 44, and "need for fresh ideas and enthusiastic energy of new employees" was ignored by the district court, wrongly referring in the Memorandum Opinion at A12 to *Goldberg v. B. Green and Co., Inc.*, 836 F.2d 845 848 (4th Cir. 1 988)("naked opinion, without more, is not enough to establish *a prima facie* case

of[] discrimination. Conclusory assertions that: [defendant's] state of mind and motivation are in dispute are not enough to withstand summary judgment."), which was different from the circumstances in the current case. The undisputed direct evidence in this case showed that the district court far departed from the accepted decisions since "direct evidence would be what [the selecting official] said or did in the specific employment decision in question." See *Plair v. E.J. Brach & Sons, Inc.*, 105 F.3d 343, 347 (7th Cir. 1997). A departure of the lower court from the accepted decisions with regard to the direct evidence of age discrimination and discriminatory attitude towards Petitioner was based on defendants' arguments void of any supporting evidence. The undisputed evidence of discriminatory attitude because of Petitioners' age and a pattern and practice of age discrimination when Defendant King did not select or assign the most qualified Petitioner to a number of positions, but selected the youngest and the least qualified individuals, were sufficient to defeat summary judgment. Petitioner presented ample evidence of a pattern and practice of age discrimination against him as a series of secret promotions of younger employees with inferior qualifications than Petitioners' qualifications under the pretext of "accretion of duties" in an effort to conceal a promotion opportunity from Petitioner. The undisputed evidence of a pattern and practice of age discrimination in a series of denied promotions and assignments to the positions leading to promotion established disparate treatment and created an inference of age discrimination against Petitioner because promotions under the "accretion of duties" were unknown to Petitioner and were

made secretly in violation of the agency own regulations specifically requiring that "[t]he potential for future promotion must be made known to all potential applicants". The district court further abused discretion by concluding in the Memorandum Opinion at A11 footnote 3: "As a matter of law, the record reflects that several of these alleged non-promotions were not promotional opportunities at all, but rather were mere discretionary reassignments" contrary to the undisputed evidence that assignments were to positions of higher responsibility leading to promotion. Plaintiff was unaware of the promotion and assignment opportunities and in fact the vacancy announcement was not posted for the LHA(R) and DD (X) Signature Coordinator positions contrary to the policy to compete positions and assignments leading to promotions, while the CVNX position was competed and Plaintiff applied for the assignment with 11 other candidates. In addition, the district court further abused discretion by concluding in the Memorandum Opinion at A12 footnote 4: "[h]owever, the court does not assume plaintiff's qualifications as to the December 2002 selection for interdisciplinary engineer," contrary to the evidence clearly establishing that plaintiff was qualified for the position and the undisputed evidence, which showed that the panel members were aware about plaintiff's participation in protected activities and unfairly rated plaintiff' application "one of the lowest", which created an inference of bias, unlawful discrimination, and a jury question because the subjective process of evaluation and the contrast in ratings of the Plaintiff's application were indistinguishable from intentionally discriminatory practices as this Court

concluded in *Watson v. Fort Worth Bank and Trust*, 487 U.S. 989 (1988). The clear focus of the *Watson's* opinion is not the degree to which subjective discretion is tolerated, but instead the subjective criteria in the selection can have deleterious effects that are indistinguishable from intentionally discriminatory practices. The appeals court did not address any issue of intentional age discrimination and retaliations against Petitioner, but sanctioned obvious departure of the lower court from the court's own decision in *Lowery v. Circuit City Stores, Inc.*, 158 F.3d at 760-61 (4th Cir. 1998), finding that an individual plaintiff may "use evidence of a pattern or practice of discrimination to help prove claims of individual discrimination within the McDonnell Douglas framework."

The district court ignored direct evidence of the discriminatory attitude based on Petitioners' age, reprisals, undisputed evidence of disparate treatment, deceptions, deliberate misrepresentations and the pattern and practice of age discrimination against Petitioner in a series of promotions of younger employees with inferior qualifications than Petitioner's qualifications in addition to the direct evidence of intent to escalate discrimination and retaliations that were highly relevant and clearly probative to the existence of discriminatory attitude and discriminatory motive towards Petitioner. The appeals court did not address these issues and sanctioned a departure of the lower court from the accepted decisions regarding direct evidence of discriminatory attitude and disparate treatment because of Petitioners' age, national origin and participation in protected activities. As this Court held in *Smith v. City of Jackson*, 544 U.S. 228 (2005),

the ADEA authorizes recovery on disparate impact claims, comparable to the claim established in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), which announced a disparate impact theory of recovery under Title VII cases. Accordingly, Petitioner respectfully requests an exercise of this Court's supervisory power to restore justice and vacate the appeals court decision, which did not address any issue raised by Petitioner, but sanctioned wrong district court opinions and decisions that conflicted and far departed from this Court's decisions and decisions of the appeals courts.

RETALIATIONS FOR PARTICIPATION IN PROTECTED ACTIVITIES

The district court decision with regard to retaliation claims also conflicted and far departed from this Court's decision in *Burlington N. & S.F. Ry. v. White*, *26 S. Ct. 2405, 2415 (2006)*. The undisputed evidence showed that Defendants retaliated against Petitioner and denied promotion, did not assign Petitioner to positions of higher responsibility to deny career ladder opportunities to Petitioner and opportunity to reach true potential at the agency; denied incentive pay demo points, time to work on EEO discrimination complaints, restoration of annual leave; and deliberately interfered with Petitioner's work by denying Petitioner's request for transfer and redirecting funding from Petitioner to work on the ILIR and Malibu antenna projects, which Petitioner proposed and got the funding to do proposed work. The district court abused discretion and far departed from this Court's decision concluding in the Memorandum Opinion at A9 in footnote 2: "To the extent that these events are

sufficiently material and adverse to be cognizable under Title VII, they suffer from the same evidentiary deficiencies as the failure to promote claims discussed below" clearly contradicting this Court's conclusion that the anti-retaliation provisions are violated whenever the employer responds to protected activity in such a way that a reasonable employee would have found the challenged action materially adverse. See *White, 26 S. Ct. at 2415.*

The district court abused discretion and clearly misconstrued the claim of denied incentive pay demo points concluding: "There is, manifestly, no probative evidence that the award of one point to plaintiff was discriminatory or retaliatory" contrary to the claim of denied additional incentive pay and undisputed evidence of retaliation for Petitioner's participation in EEO and Whistleblowing activities. Petitioner presented direct evidence of Defendants' intent to escalate retaliations and Defendants' conspiracy to escalate discrimination and retaliations in the September 30, 2002 email when Defendant Jebsen instructed subordinates: "It's time to crack down on them [Petitioner and his brother]... Dave Caron has mentioned it twice now." In November 2002, Defendants denied Petitioner time to work on EEO discrimination complaints, incentive pay, and restoration of annual leave. The direct evidence and demonstrably discriminatory motive to retaliate against Petitioner were sufficient to defeat summary judgment besides the raised question of Defendants' credibility that should be decided by a jury during the trial. The nexus of Plaintiff's participation in protected activities and the cumulative effect of a pattern and practice of intentional discrimination

and antagonism prove causation by looking at the evidence as a whole because "[a] discrimination analysis must concentrate not on individual incidents, but on the overall scenario." *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1484 (3d Cir. 1990).

Petitioner established strong *prima facie* cases of intentional discrimination and retaliations under ADEA, Title VII, and WPA presenting ample evidence of intentional retaliations because of Petitioner's participation in prior EEO and Whistleblowing activities. Petitioner's strong *prima facie* cases of retaliations and close temporal proximity between Petitioner's protected activities and the adverse employment actions against Petitioner in addition to the direct evidence of intent and conspiracy to escalate retaliations, including the pattern or practice of intentional discrimination and retaliations against Petitioner and by looking at the evidence as a whole proved causation and created an inference of retaliations. In addition, Petitioner showed that Defendants proffered pretext unworthy of credence. However, the district court decisions conflicted and far departed from accepted and usual course of judicial proceedings by granting Defendants' motion for summary judgment contrary to the direct evidence of a systematic policy and practice of discrimination and retaliations, failure to take immediate remedial measures, and a series of related distinct acts of intentional discrimination and retaliations against Petitioner during administrative processing of the Petitioner's EEO discrimination complaints. Accordingly, Petitioner respectfully submits a writ of certiorari for an exercise of this Court's supervisory power to restore justice.

CONCLUSION

Wherefore, in consideration of the above, Petitioner respectfully submits petition for a writ of certiorari for the Court's decision to grant the petition and vacate the appeals court decision that sanctioned wrong and erroneous reasons stated in the district court opinions. Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Date 04/07/09

Yuri Stoyanov

Yuri Stoyanov

APPENDIX

FILED: January 15, 2009

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 08—2040
(1: 06—cv—01244—AMD)

YURI J. STOYANOV,
Plaintiff - Appellant

V.

DONALD C. WINTER, Secretary of the Navy; STEPHAN W. PETRI, Individually and in his Official Capacity as Head of the Carderock Division; GARY M, JEBSEN, Individually and in his Official Capacity as the Head of Code 70 Carderock Division; KEVIN N. WILSON, Individually and in his Official Capacity as the Acting Head of Code 74 Carderock Division; JAMES H. KING, Individually and in his Official Capacity as the Head of Code 74 Carderock Division; JOHN C. DAVIES, Individually and in his Official Capacity as the Deputy Head of Code 74 Carderock Division; MATHEW CRAUN, Individually and in his Official Capacity as the Head of Code 722 Carderock Division; PAUL SHANG, Individually and in his Official Capacity as the Head of Code 72 Carderock Division; GERALD SMITH, Individually and in his Official Capacity as Deputy Head of Code 70 Carderock Division; ROGER FORD, Individually and in his Official Capacity as the Head of Code 7014 Carderock Division; N. KATHLEEN FOWLER, Individually and in her Official Capacity as

Administrative Officer Code 709; DAVID CARON, Individually and in his Official Capacity as Assistant Counsel Code 39; JOSEPHINE MCGRATH, Individually and in her Official Capacity as Complaints Manager/Acting Deputy EEO Chief Code 034,

Defendants – Appellees

JUDGMENT

In accordance with the decision of this Court, the judgment of the District Court is affirmed.

This judgment shall take effect upon issuance of this Court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08—2040

YURI J. STOYANOV,
Plaintiff - Appellant,

V.

DONALD C. WINTER, Secretary of the Navy; STEPHAN W. PETRI, Individually and in his Official Capacity as Head of the Carderock Division; GARY M. JEBSEN, Individually and in his Official Capacity as the Head of Code 70 Carderock Division; KEVIN M. WILSON, Individually and in his Official Capacity as the Acting Head of Code 74 Carderock Division;

JAMES H. KING, Individually and in his Official Capacity as the Head of Code 74 Carderock Division; JOHN C. DAVIES, Individually and in his Official Capacity as the Deputy Head of Code 74 Carderock Division; MATHEW CRAUN, Individually and in his Official Capacity as the Head of Code 722 Carderock Division; PAUL SHANG, Individually and in his Official Capacity as the Head of Code 72 Carderock Division; GERALD SMITH, Individually and in his Official Capacity as Deputy Head of Code 70 Carderock Division; ROGER FORD, Individually and in his Official Capacity as the Head of Code 7014 Carderock Division; M. KATHLEEN FOWLER, Individually and in her Official Capacity as Administrative Officer Code 709; DAVID CARON, Individually and in his Official Capacity as Assistant Counsel Code 39; JOSEPHINE MCGRATH, Individually and in her Official Capacity as Complaints Manager/Acting Deputy EEO Chief Code 034,

Defendants — Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Andre M. Davis, District Judge. (1:06-cv-0 124 4—AMD)

Submitted: January 13, 2009
Decided: January 15, 2009

Before WILLIAMS, Chief Judge, and TRAXLER and KING, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Yuri J. Stoyanov, Appellant Pro Se.

John Walter Sippel, Jr., Assistant United States Attorney, Baltimore, Maryland, for Appellees.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Yuri J. Stoyanov appeals the district court's order dismissing his claims under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e to 2000e—17 (2000), the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §~ 621 to 634 (2000), the Whistleblower Protection Act, 5 U.S.C. §~ 1214, 1221 and 2302 (2006), and various state law tort claims, as well as its order denying his Fed. R. Civ. P. 59(e) motion for reconsideration. We have reviewed the record and find no reversible error. Accordingly, we affirm the district court's orders, See Stoyanov v. Winter, No, 1:06—cv—01244-AMD (D. Md. Aug. 11, 2008; Aug. 27, 2008). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

YURI J. STOYANOY,
Plaintiff

v. Civil No. AMD 06-1244

GORDON R. ENGLAND, SECRETARY
OF THE NAVY, et al.,
Defendants

ORDER

Plaintiff's "Motion to Reconsider the August 11, 2008 Order and Amend the Judgment" has been carefully reviewed. For the reasons previously explained in the Court's Memorandum Opinion, it is this *27th* day of August, 2008, by the United States District Court for the District of Maryland, ORDERED

(1) The "Motion to Reconsider the August 11, 2008 Order and Amend the Judgment" is DENIED; and it is further ORDERED

(2) The Clerk SHALL MAIL a copy of this order to plaintiff pro *se*.

ANDRE M. DAVIS
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

YURI J. STOYANOV,
Plaintiff

V. Civil No. AMD 06-1244

GORDON R. ENGLAND, SECRETARY
OF THE NAVY, et al,
Defendants

ORDER

For the reasons set forth in the foregoing Memorandum Opinion, it is this 11th day of August,

2008, by the United States District Court for the District of Maryland, ORDERED

(1) The motion to dismiss or in the alternative for summary judgment (Paper No.30) is GRANTED and JUDGMENT IS ENTERED IN FAVOR OF DEFENDANTS AGAINST PLAINTIFF; and it is further ORDERED

(2) The Clerk SHALL MAIL a copy of this order to plaintiff pro se and CLOSE THIS CASE.

/s/
ANDRE M. DAVIS
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

YURI J. STOYANOV,
Plaintiff

V. Civil No. AMD 06-1244

GORDON R. ENGLAND, SECRETARY OF THE NAVY, et al,
Defendants

MEMORANDUM OPINION

This case is the second of seven federal employment discrimination actions instituted by pro se plaintiff Yuri Stoyanov in this court. Plaintiff is employed by the Department of the Navy. In this (and in all of his other actions) plaintiff alleges, *inter alia*, that he suffered discrimination in the workplace based on national origin and age, and that lie has been the victim of retaliation for his involvement in protected activity. As is sometimes true in federal employment

discrimination actions, in this ease the administrative record created prior to the commencement of the judicial action is substantial. Even more fundamentally, because plaintiff has pyramided his claims and filed judicial actions *seriatim* while incorporating earlier allegations into later complaints, the prior adjudications of plaintiff's claims necessarily narrow the scope of subsequent claims. Accordingly, although there has been no discovery, defendants' motion to dismiss, or in the alternative, for summary judgment, treated here as a motion for summary judgment, is entirely appropriate. Plaintiff has filed opposition papers which are voluminous. Oral argument is not necessary. For the reasons that follow, the motion shall be granted.

Stoyanov was born in the former U.S.S.R. on April 7, 1955, and became a United States citizen in 1984. *Compl.* ¶33. After his receiving doctorate degree in physics, plaintiff began his employment as a Scientist with the Department of the Navy, Naval Surface Warfare Center, Carderock Division ("NSWCCD") on September 1, 1987. *Compl* ¶1 34,36. During the period relevant to this action Steven Petri served as the head of NSWCCD.
Gary Jebsen, Gerald Smith, Roger Ford, Kevin Wilson, James King, John Davies, Paul
Shang, and Mathew Craun were heads of various units at NSWCCD and plaintiff's superiors.
Compl ¶~12,13,15-20. Mary Fowler was an Administrative Officer, Josephine McGrath was the EEO Complaints Manager, and David Caron was the Assistant Counsel to NSWCCD. *Compl* ¶1 14, 21, 22. Plaintiff names all of these individuals, as well as the Secretary of the Navy, as defendants in this action.

I

Stoyanov contends that "at all relevant times [he] received favorable performance evaluations and performed his job in [a] superb manner receiving performance and service awards for outstanding service and exemplary performance." *Compl* ¶ 37. Nonetheless, he alleges, he was repeatedly passed over for promotions and favorable reassignments, and deprived of leave, among other adverse actions. These adverse actions were allegedly taken against him either out of animus related to plaintiff's age and national origin, or in retaliation for plaintiff's vocal opposition to discrimination he experienced.

II

Plaintiff filed his first formal charge of discrimination in March 2002; the present action encompasses the allegations of his second EEO complaint, filed sometime thereafter, *Compl* ¶1 24,51, and relates to events and alleged adverse employment actions occurring between Spring 2002 and Winter 2002. In any event, the relevant procedural/factual context of this and the multitude of related cases filed by the plaintiff (and his twin brother) is described in detail in earlier opinions by this court, *see Stoyanov v. Winter,* 2006 WL 5838450 (D.Md. July 25, 2006) (Bennett, J.)(granting in part and denying in part defendants' motion to dismiss two consolidated cases, one for each brother, arising out of their first administrative charge of discrimination); *id.,* 2007 WL 2359771 (D.Md. Aug. 15, 2007) (Bennett, J.) (granting defendants' post-discovery dispositive motion and entering judgment for defendants in consolidated cases), *aff'd,* 2008 WL 501275 (4th Cir. Feb. 25, 2008) (unreported)(affirming judgment in favor of defendants); and the United States Court of Appeals for the Federal Circuit, *Stoyanov v. Merit Systems Protection Bd.,* 2007 WL

444806 (Fed. Cir. April 16, 2007)(unpublished) (affirming dismissal of Whistleblower Act claims), *cert. denied,* 128 S.Ct. 247(2007). That history need not be repeated here. *See also Stoyanov v. Merit Systems Protection Rd.,* 474 F.3rd 1377 (Fed. Cir. 2007)(affirming dismissal of brother's Whistleblower Act claims), *cert. denied,* 128 S.Ct. 247 (2007).
As mentioned above, this is plaintiff's second (of seven) judicial actions for relief, which grows out of his second charge of discrimination.[1] What is perfectly apparent is that the prior opinions and orders by Judge Bennett in plaintiff's earlier case, *see* 2006 WL *5838450* (D.Md. July *25,* 2006) and 2007 WL 2359771 (D. Md. Aug. 15, 2007), as affirmed by the Fourth Circuit, 2008 WL 501273 (4th *Cii.* Feb. *25,* 2008)(unreported), leaves very little to he adjudicated here, The court agrees with defendants that the only properly exhausted, cognizable discrimination/retaliation claims in this iteration of plaintiff's many complaints are those mentioned below.

III

The core of Stoyanov's case is employment discrimination. The gravamen of these claims is that, on the basis his age, 'national origin and/or in retaliation for his having engaged in protected activity, the Navy refused to promote or reassign plaintiff.[2]

---

[1] In Orders entered by Judge Bennett and reconfirmed by this author, the court has limited plaintiff and his brother to one active case at a time. *See* docket no.52, Order of July 23, 2008.

[2] Stoyanov also complains of several other events related to his employment which, he contends, are adverse employment actions. First, plaintiff complains that defendants denied him sufficient time and use of government resources to work on his various EEOC cases.

Plaintiff feels aggrieved by his inability to secure a promotion to an ND-5 level position, or a reassignment that might lead to a. better opportunity for such a promotion, in some cases because he was allegedly denied the opportunity to apply and in others because another candidate was selected over plaintiff. He essentially argues that every occasion on which an ND-5 vacancy became available and he was not promoted was an incident of discrimination. In that connection he catalogs the following vacancies which were filled by other applicants:

- In September 2002, a thirty-eight year old, American-born candidate was promoted to Deputy Head of O5T1 over plaintiff
- In October 2002, another candidate was promoted

Compl ¶89. Second, Stoyanov alleges that, in April 2003, defendants "denied plaintiff funding by redirecting 6.1 ILIR program work" *Compl.* ¶90. Finally, plaintiff complains of being transferred from Ship Electromagnetic Signature Technology (Code 74) to Submarine Acoustics (Code 72) and that his request to be transferred back to his original work group was denied. *Compl.* ¶¶46, 91. To the extent that these events are sufficiently material and adverse to be cognizable under Title VII, they suffer from the same evidentiary deficiencies as the failure to promote claims discussed below.

Plaintiff also feels aggrieved because he was awarded only one "demo point" based on his work performance during Fiscal 2002, and certain annual leave was not restored. The record shows that some of plaintiff's co-workers received no "demo points" and some received more than one. There is, manifestly, no probative evidence that the award of one point to plaintiff was discriminatory or retaliatory. Moreover, no other employee working for plaintiff's supervisor received a restoration of annual leave, This claim fails as a matter of law.

to Acting Head of Code 74

- In October 2002, plaintiff was denied the opportunity to apply for Total Ship Survivability Coordinator for which a thirty-eight year old, American-born candidate was selected
- In October 2002, plaintiff was denied the opportunity to apply for DD(X) Gold Team Signature Coordinator for which an American-born candidate was selected
- In December 2002, plaintiff was not selected for promotion to Interdisciplinary Engineer, ND-5[3]

Defendants argue, and this court agrees, that Stoyanov is unable to demonstrate his employment discrimination claims through direct evidence. Accordingly, the familiar burden-shifting framework of *McDonnell Douglas* applies to plaintiff's Title VII and ADEA claims. *McDonnell Douglas Corp. v. Green,* 411 U.S. 791,802(1973); *Caussade v Brown,* 924 F.Supp. 693. 698 (D. Md. 1996), *aff'd,* 107 F.3d 865 (4th Cir. 1997).

The first step in the *McDonnell Douglass* analysis requires plaintiff to establish a *prima facie* case of discrimination. *McDonnell Douglas Corp.,* 411 U.S. at 802. Plaintiff's claim is for disparate treatment, principally in promotion, requiring him to demonstrate by a preponderance of the evidence that "(1) []he is a member of a protected class; (2) [his] employer had an open position for which []he applied or sought to apply; (3) [he was qualified for the position; and (4) []he was

---

[3] As a matter of law, the record reflects that several of these alleged non-promotions were not promotional opportunities at all, but rather were mere discretionary reassignments. Moreover, as to Vacancy Announcement CAR 02-0074, plaintiff was not considered because he failed to indicate an interest in the position in the proper manner.

rejected for the position under circumstances giving rise to an inference of unlawful discrimination. *Evans v. Technologies Applications & Svc. Co.*. 80 F.3d 954, 959-60 (4th Cir. 1996); *Foreman v. Weinstein,* 485 F.Supp.2d 608,613 (D. Md. 2007).

Stoyanov is plainly able to establish the first and second elements of a *prima facie* case and the court assumes, *arguendo,* that he can satisfy the third requirement.[4] However, there is no basis in the record from which the court could infer that unlawful discrimination played a role in defendants' selection processes. Plaintiff has not produced any meaningful evidence to suggest that his age, Russian origin, or prior complaints were factors in his inability to secure a promotion to an ND-5 level position. Stoyanov's arguments are based on his own conspiratorial theories and conclusory leaps in reasoning rather than evidence. *See Goldberg v. B. Green and Co., Inc.,* 836 F.2d 845 848 (4th Cir. 1 988)("naked opinion, without more, is not enough to establish *a prima facie* case of[] discrimination. Conclusory assertions that: [defendant's] state of mind and motivation are in dispute are not enough to withstand summary judgment."). Furthermore, even assuming that plaintiff had established a *prima facie* case, he cannot refute the legitimate, non-discriminatory explanations defendants have offered for their appointments.

In sum, Stoyanov urges the court to substitute its judgment, or more accurately Stoyanov's, for that of

---

[4] However, the court does not assume plaintiff's qualifications as to the December 2002 selection for interdisciplinary engineer. Among the more than two dozen applicants screened by a neutral panel for that selection, plaintiff was rated one of the lowest and was not selected for interview. As a matter of law, the claim fails.

his employer on no more basis than plaintiff's own assertions that he is the most qualified candidate. *See DeJarnette v. Corning, Inc.*, 133 F.3d 293,298(4th Cr. 1998)("Title VII is not a vehicle for substituting the judgment of a court for that of the employer."). No reasonable factfinder could return a verdict in favor of Stoyanov on this record, therefore summary judgment in favor of defendants is appropriate as to each of the cognizable discrimination and retaliation claims.

IV

For the forgoing reasons, and those set forth in the opinions of Judge Richard D. Bennett at 2006 WI, 5838450 (D.Md. July 25, 2006), and 2007 WL 2359771 (D.Md. Aug. 15, 2007), defendants are entitled to judgment as a matter of law. An Order follows.

Filed: August 11, 2008 /s/
Andre M. Davis
United States District Judge

No. 08-1238

In the Supreme Court of the United States

YURI J. STOYANOV, PETITIONER

v.

RAY MABUS, SECRETARY OF THE NAVY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
MARLEIGH D. DOVER
MARK W. PENNAK
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals, in affirming the district court's dismissal of petitioner's employment discrimination and retaliation claims, "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power" under Rule 10(a) of this Court's rules.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes, regulation and rule:

In the Supreme Court of the United States

No. 08-1238

YURI J. STOYANOV, PETITIONER

v.

RAY MABUS, SECRETARY OF THE NAVY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A4) is not published in the *Federal Reporter* but is reprinted in 305 Fed. Appx. 945. The orders of the district court granting summary judgment in favor of respondents (Pet. App. A5-A13) and denying reconsideration (Pet. App. A4-A5) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 15, 2009. The petition for a writ of certiorari was filed on April 7, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was born in the former Soviet Union in 1955 and became an American citizen in 1984. Since

1987, petitioner has been employed by the Department of the Navy as a scientist at the Naval Surface Warfare Center, Carderock Division in Maryland. Pet. App. A7. Beginning in 2002, petitioner has filed a series of pro se lawsuits against the Secretary of the Navy and other Navy officials alleging a variety of forms of employment discrimination. *Id.* at A8-A9.

In his first suit, petitioner, along with his twin brother (also then employed by the Navy), alleged that the Navy had violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, the Age Discrimination in Employment Act, 29 U.S.C. 621 *et seq.*, and the Whistleblower Protection Act, 5 U.S.C. 1214 *et seq.* Specifically, petitioner and his brother contended that they were denied promotions and subjected to other forms of employment discrimination on the basis of their national origin, their age, and as retaliation for engaging in protected activities. Pet. App. A8-A9. After exhausting their administrative remedies, petitioner and his brother pursued the discrimination and retaliation claims in federal district court and sought relief on the whistleblower claims before the Merit Systems Protection Board (MSPB).

In July 2006, the district court granted partial summary judgment for the defendants on the employment discrimination claims. See *Stoyanov* v. *Winter*, No. 05-1567, 2006 WL 5838450 (D. Md. July 25, 2006). After discovery, the court granted complete summary judgment for the defendants and dismissed petitioner's (and his brother's) claims. See *Stoyanov* v. *Winter*, No. 05-1567, 2007 WL 2359771 (D. Md. Aug. 15, 2007). Those decisions were later affirmed by the Fourth Circuit, and plenary review was denied by this Court. See

Stoyanov v. *Winter*, 266 Fed. Appx. 294 (4th Cir.) (per curiam), cert. denied, 129 S. Ct. 258 (2008).

With respect to petitioner's whistleblower claims, the MSPB dismissed those claims for lack of jurisdiction. The Federal Circuit affirmed that decision, and plenary review was denied by this Court. See *Stoyanov* v. *MSPB*, 218 Fed. Appx. 988, 989 (Fed. Cir.) (per curiam), cert. denied, 128 S. Ct. 247 (2007).[1]

2. This case involves the second of petitioner's seven employment discrimination complaints.[2] Like in his first lawsuit, petitioner claims, *inter alia*, that he was subjected to unlawful discrimination on the basis of his national origin and age and that he was retaliated against for his previous complaints. Specifically, petitioner contends that he was discriminated against by the Navy when it refused to promote him to various positions, failed to provide him with reassignments that would have offered better opportunities for promotion, and deprived him of leave. Pet. App. A8-A10. Respondents filed a motion to dismiss or, in the alternative, for summary judgment.

3. On August 11, 2008, the district court granted summary judgment in favor of respondents and dismissed petitioner's complaint. The district court began by noting that, "because [petitioner] has pyramided his claims and filed judicial actions *seriatim* while incorporating earlier allegations into later complaints, the prior

---

[1] The Federal Circuit also affirmed the dismissal of petitioner's brother's whistleblower claims. See *Stoyanov* v. *Department of the Navy*, 474 F.3d 1377 (Fed. Cir.), cert. denied, 128 S. Ct. 247 (2007).

[2] The district court has entered orders limiting "plaintiff and his brother to one active case at a time." Pet. App. A9 n.1. The complaint at issue here "relates to events and alleged adverse employment actions occurring between Spring 2002 and Winter 2002." *Id.* at A8.

adjudications of [petitioner]'s claims necessarily narrow the scope of subsequent claims." Pet. App. A7. The court observed that, based on the opinions and orders from petitioner's earlier case, there was "very little" left to be "adjudicated here." *Id.* at A9.

For those remaining cognizable claims, the district court held that petitioner failed "to demonstrate his employment discrimination claims through direct evidence." Pet. App. A11. Accordingly, the court applied the "familiar burden-shifting framework" of *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). As for the first step in that analysis, the court determined that petitioner had not established a *prima facie* case of discrimination. Specifically, the court found that there was "no basis in the record from which the court could infer that unlawful discrimination played a role in [respondents'] selection processes."[3] Pet. App. A12. The court addressed each of petitioner's claims of discrimination, see *id.* at A9-A11 & nn.2-3, and concluded that petitioner had "not produced any meaningful evidence to suggest that his age, Russian origin, or prior complaints were factors in his inability to secure a promotion," *id.* at A12. Rather, the court observed, petitioner's "arguments [were] based on his own conspiratorial theories and conclusory leaps in reasoning." *Ibid.*

---

[3] The court held that in order to establish a prima facie case of discrimination for failure to promote, petitioner had to demonstrate that (1) he is a member of a protected class; (2) his employer had an open position for which he applied or sought to apply; (3) he was qualified for the position; and (4) he was rejected for the position under circumstances giving rise to an inference of unlawful discrimination. Pet. App. A11-A12 (citing *Evans* v. *Technologies Applications & Serv. Co.*, 80 F.3d 954, 959-960 (4th Cir. 1996)). The court found that petitioner satisfied the first two prongs and assumed, *arguendo*, that he demonstrated the third. *Id.* at A12.

The court further held that, "even assuming that [petitioner] had established a *prima facie* case, he cannot refute the legitimate, non-discriminatory explanations [respondents] have offered for their appointments." Pet. App. A12. Consequently, the court held that under the *McDonnell Douglas* framework, "[n]o reasonable factfinder could return a verdict in favor of [petitioner] on this record." *Id.* at A13.

4. The court of appeals affirmed in a brief, unpublished, per curiam opinion. The court stated that "[w]e have reviewed the record and find no reversible error." Pet. App. A4.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review of that fact-bound ruling is not warranted.

1. As an initial matter, petitioner argues that this Court should grant the petition for a writ of certiorari in order to exercise its "supervisory power." See, *e.g.*, Pet. i; Pet. 13 (requesting "an exercise of this Court's supervisory power to restore justice and vacate the appeals court decision"); Pet. 15 (same). That contention lacks merit.

Pursuant to Rule 10(a) of this Court's rules, this Court may grant a petition for a writ of certiorari to determine whether "the Court of Appeals ha[s] 'so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory powers.'" *Nguyen* v. *United States*, 539 U.S. 69, 74 (2003). This Court has traditionally exercised its supervisory powers to correct errors involving "the proper administration of judicial business." *Id.* at 81

(quoting *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 536 (1962) (opinion of Harlan, J.)). The Court thus invokes its supervisory powers "to prescribe the method by which [lower courts] go about deciding the cases before them." *Id.* at 81 n.13 (quoting *Lehman Brothers* v. *Schein*, 416 U.S. 386, 393 (1974) (Rehnquist, J., concurring)); see *McCarthy* v. *United States*, 394 U.S. 459, 463-464 (1969).

Petitioner's claims of error are plainly not of that sort. Petitioner has not pointed to any defect in the procedures employed by the district court or the court of appeals in considering his case. Rather, petitioner merely argues that the lower courts erred in a routine application of federal law to the particular facts of this case. Accordingly, an exercise of this Court's supervisory powers is not warranted.

2. Petitioner renews his contention (Pet. 6-15) that the district court erred in granting summary judgment for respondents. Notably, petitioner does not claim that the court relied on an erroneous legal standard but rather that it erred in its assessment of petitioner's evidence. See, *e.g.*, Pet. 6 (asserting that "[p]etitioner presented ample evidence to defeat [respondents'] motion for summary judgment"). The district court correctly granted summary judgment for respondents, and that fact-bound ruling does not warrant this Court's review.

Despite petitioner's claims to the contrary, the district court correctly held that petitioner did not present any direct evidence of discrimination or retaliation. Pet. App. A11. In his petition, much like in his filings before the lower courts, petitioner relies primarily on unsubstantiated and conclusory allegations. See, *e.g.*, Pet. 10 (alleging a "series of secret promotions of younger employees with inferior qualifications than [petitioner] under the pretext of 'accretion of duties' in an effort to

conceal a promotion opportunity from [p]etitioner"); see Pet. App. A12 (finding that petitioner's "arguments [were] based on his own conspiratorial theories and conclusory leaps in reasoning rather than evidence"). Such assertions cannot defeat a properly supported motion for summary judgment. See *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 325-326 (1986).

To the extent petitioner points to more specific evidence, his claims are equally unavailing. For example, petitioner contends (Pet. 9-10) that a March 2000 email sent by one of petitioner's superiors to a number of individuals, including petitioner's brother, is "direct evidence of the selecting official's discriminatory attitude based on [p]etitioner's age." Pet. 9. However, petitioner relied on that very same email message in his first lawsuit, where he also claimed that the email was direct evidence of age discrimination. The district court in that case, after considering that email message in its proper context, held that the email "does not constitute direct evidence of discrimination." *Stoyanov* v. *Winter*, No. 05-1567, 2006 WL 5838450, at *10 (D. Md. July 25, 2006). That decision was later affirmed by the Fourth Circuit. *Stoyanov* v. *Winter*, 266 Fed. Appx. 294 (4th Cir.) (per curiam), cert. denied, 129 S. Ct. 258 (2008). As a result, petitioner is precluded from arguing that the email is direct evidence of discrimination a second time around. See, *e.g.*, *Nevada* v. *United States*, 463 U.S. 110, 129-130 (1983) ("[W]hen a final judgment has been entered on the merits of a case, '[i]t is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which

might have been offered for that purpose.'") (quoting *Cromwell* v. *County of Sac*, 94 U.S. 351, 352 (1876)).[4]

Petitioner also asserts (Pet. 14) that a September 2002 email message, in which respondent Gary Jebsen stated that it was time "to crack down" on petitioner and his brother, constituted "direct evidence of [respondents'] intent to escalate retaliations." Petitioner fails to note, however, that the supposed "crack down" mentioned in that message concerned petitioner's excessive use of official government time and resources to work on his multitude of Equal Employment Opportunity (EEO) complaints. In accordance with 29 C.F.R. 1614.605(b), the Navy afforded petitioner official time to pursue his EEO complaints against the agency. However, the Navy found that petitioner was abusing that right by working on such matters for an excessive number of hours. The alleged "crack down" was merely the Navy's effort to enforce reasonable restrictions on petitioner's use of official government time. Specifically, the Navy decided to limit the official time petitioner could spend

---

[4] In any event, the email message does not present direct evidence of discrimination when considered in its proper context. The remarks about the "need for fresh ideas and enthusiastic energy of new employees" were made in the context of a discussion about the number of current employees over the age of 55 and the projected increase in the number of such employees over the next several years. The email expressed concern over the possibility of losing many experienced workers because of retirement and attrition. Based on those concerns, the email stated that "we need to keep new employees coming in to overcome the loss of experience." *Stoyanov*, 2006 WL 5838450, at *10. The district court first presented with this email correctly concluded that it "create[d] no inference of age bias" and "reflect[ed] no more than a fact of life and as such is merely a 'truism[]' that carries with it no disparaging undertones." *Ibid.* (quoting *Birkbeck* v. *Marvel Lighting Corp.*, 30 F.3d 507, 512 (4th Cir. 1994)).

on his EEO complaints to between two and four hours per week. In March 2003, the Equal Employment Opportunity Commission largely sustained those restrictions as reasonable under Section 1614.605(b). See Gov't Reply Mem. in Support of Mot. to Dismiss or, in the Alternative, for Summary Judgment, Exh. 5.

In any event, like with the other email message discussed above (and, for that matter, most of petitioner's assertions), petitioner is precluded from relying on this argument because it was raised and rejected in his initial lawsuit. In his first district court complaint, petitioner alleged that the September 2002 email message was evidence of intentional discrimination and retaliation. See Compl. ¶ 74, *Stoyanov* v. *Winter*, *supra* (No. 05-1567 (Aug. 15, 2007)). As noted above, the district court found against petitioner on those claims in a decision that was affirmed on appeal. See *Stoyanov*, 2007 WL 2359771, at *1. As a result, petitioner is barred from simply repeating the same allegations here. Indeed, as the district court in this case correctly recognized, "the prior adjudications of plaintiff's claims necessarily * * * leave[] very little to be adjudicated here." Pet. App. A7-A9.

After finding no direct evidence of discrimination or retaliation, the district court correctly applied the *McDonnell Douglas* burden-shifting framework. The court first determined that petitioner did not satisfy the first step in that analysis because he could not establish a *prima facie* case. The court held that petitioner had "not produced any meaningful evidence to suggest that his age, Russian origin, or prior complaints were factors in his inability to secure a promotion." Pet. App. A12. Nothing in petitioner's petition casts doubt on that factual assessment.

The district court also held that, "even assuming that [petitioner] had established a *prima facie* case, he cannot refute the legitimate, non-discriminatory explanations [respondents] have offered for their appointments." Pet. App. A12. Petitioner has failed to provide any credible evidence to the contrary.[5]

In sum, the district court correctly determined that petitioner failed to present any direct evidence of discrimination or retaliation, that petitioner could not establish a *prima facie* case under either theory, and that, even assuming petitioner could make a *prima facie* showing, he could not rebut respondents' legitimate, non-discriminatory explanations for their decisions. Because petitioner points to no evidence that would undermine those conclusions, further review of those fact-bound rulings is not warranted.[6]

---

[5] The Court's expected decision in *Gross* v. *FBL Fin. Servs., Inc.*, No. 08-441 (argued Mar. 31, 2009), has no bearing on this case. The question presented in *Gross* is whether a plaintiff must present direct evidence of discrimination in order to obtain a mixed-motive instruction in a discrimination case under the Age Discrimination in Employment Act. That issue is not implicated here. To begin, petitioner does not assert that this is a mixed-motive case. Furthermore, the district court held that petitioner failed to "produce[] any meaningful evidence"—direct, circumstantial, or otherwise—"to suggest that his age" was a "factor[] in his inability to secure a promotion." Pet. App. A12. Because the court found that there was *no* evidence that petitioner's age was a factor in the Navy's decision-making, any sort of mixed-motive analysis would be inapposite.

[6] Petitioner also contends (Pet. 6-15) that the court of appeals and district court "departed from the accepted decisions" of the Fourth Circuit. Even if that assertion were correct—and it is not—, any such intra-circuit conflict does not merit this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General
TONY WEST
Assistant Attorney General
MARLEIGH D. DOVER
MARK W. PENNAK
Attorneys

JUNE 2009

(3)

No. 08-1238

In The
Supreme Court of the United States

YURI J. STOYANOV,
Petitioner

v.

DONALD C. WINTER,
SECRETARY OF THE NAVY; ET. AL.,
Respondents.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Fourth Circuit

RESPONSE TO BRIEF FOR THE RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Yuri J. Stoyanov
7560 Pindell School Rd.
Fulton, MD 20759
(301) 604-7615

QUESTIONS PRESENTED FOR REVIEW

Petitioner seeks decision to vacate the appeals court decision, which did not address any issue raised by Petitioner, but sanctioned wrong district court opinions that conflict and so far depart from this Court's decisions and decisions of the appeals courts as to call for an exercise of this Court's supervisory power. The conflicting and wrong reasons stated in the district court opinion and the appeals court decision present the following questions:

1. Whether Petitioner could establish a *prima facie* case of age discrimination based upon promotion selections?

2. Whether presenting evidence of disparate treatment and a pattern or practice of intentional discrimination because of age and retaliations for protected activities in addition to refuting Defendants' contentions are sufficient to defeat summary judgment?

3. Whether Petitioner provided sufficient evidence to establish pretext to defeat summary judgment?

TABLE OF CONTENTS

TABLE OF CASES

TABLE OF EXHIBITS

PETITIONER'S RESPONSE TO RESPONDENTS' OPPOSITION

Petitioner Dr. Yuri Stoyanov responds to the Brief For The Respondents In Opposition to the Petitioner's writ of certiorari for the Court's consideration and decision to vacate the appeals court decision, which sanctioned a decision by a lower court that conflicts and so far departs from this Courts' decisions as to call for an exercise of this Court's supervisory power. The Respondents' Opposition failed to produce any relevant evidence to oppose the petition for a writ of certiorari and the Court's decision to grant the petition and vacate the appeals court decision, which did not address any issue raised by Petitioner, but sanctioned wrong and erroneous reasons stated in the district court opinion that call for an exercise of this Court's supervisory power.

The Respondents' Opposition proffered deceitful information and did not follow the Rule 24 (6.) that the "brief shall be concise, logically arranged with proper headings, and free of irrelevant, immaterial, or scandalous mater" by presenting immaterial and misleading matter with respect to the petitioner's whistleblower claims, which were the subject of Defendants' retaliations and violations of the Whistleblower Protection Act (WPA) subsequent to the matters raised in the Petitioner's Complaint related to the Defendants' prohibited actions occurring between Spring 2002 and Winter 2002. The Respondents' immaterial matter and misleading statement were in the Respondents' Opposition at 2: "... After exhausting their administrative remedies, petitioner and his brother pursued the discrimination and retaliation claims in federal

district court and sought relief on the whistleblower claims before the Merit Systems Protection Board (MSPB)" (emphasis added), contrary to the evidence that Petitioner did not seek relief before the MSPB with regard to the whistleblower claims identified in the first case. The immaterial matter and misleading statements continued in the Respondents' Opposition at 3: "[w]ith respect to petitioner's whistleblower claims, the MSPB dismissed those claims for lack of jurisdiction" and violated Rule 24 (6.) because those claims were raised in 2005, and were different from the claims of retaliation for Whistleblowing activities[1] between Spring 2002 and Winter 2002.

AGE DISCRIMINATION IN PROMOTION SELECTIONS

Respondents continued quoting from the district court opinions that were irrelevant or immaterial to the writ of certiorari for the Court's decision to grant the petition and vacate the appeals court decision. Respondents improperly agued that the Petitioner's writ of certiorari for "an exercise of this Court's supervisory power to restore justice and

---

[1] Petitioner also repeatedly disclosed Defendants' violations of laws, abuse of authority, discrimination and retaliations through the chain of command including the commander of the Carderock Division and filed Complaint of Prohibited Personnel Practice with the Office of Special Counsel (OSC) after the agency officials retaliated and by fraud transferred Petitioner to a different technology department and further escalated violations of laws in the vicious circle of continuous discrimination and retaliations since April 2002. Petitioner exhausted administrative remedies available to him by choosing the EEO forum in 2002. See Pet. at 3. The other "whistleblower claims" raised in the MSPB forum as referred in the Respondents' Opposition at 3 were not part of the complaint considered by the district court and were raised in 2005 because no remedial measures had been taken by the agency in 2002. See S. Ct. Case No. **07-0024.**

vacate the appeals court decision" was not to correct errors involving "the proper administration of judicial business" and "to prescribe the method by which [lower courts] go about deciding the cases before them" contrary to the compelling reasons to grant petition for a writ of certiorari stated and based on the relevant decisions of this Court and the accepted decisions of the appeals courts because the U.S. Court of Appeals for the Fourth Circuit did not address any issue raised by the Petitioner's appeal. In fact, Petitioner referred to *Reeves v. Sanderson Plumbing Products, Inc, 530 U. S. 133, 140 (2000)*, where Court established what showing a plaintiff had to make regarding pretext in the age discrimination case and, specifically, whether a plaintiff could satisfy his burden by merely rebutting the defendant's explanation for the action. The appeals court ignored the age discrimination and retaliation claims, but sanctioned abuse of discretion and erroneous reasons stated in the district court opinion wrongly concluding "there is no basis in the record from which the court could infer that unlawful discrimination played a role in defendants' selection processes" in establishing the fourth element of the *prima facie* case for age discrimination and disparate treatment in promotion by ignoring clear evidence of age discrimination when significantly younger (by more than 9 years) selectee with inferior qualifications was promoted by manipulating selection process, committing fraud and deceptions to conceal a promotion opportunity and deny Petitioner promotion. The appeals court decision contradicted its own decisions, decisions of other appeals courts, and far departed from this Court's decisions as to call for an exercise of this Court's supervisory power to

restore justice and issue a decision in favor of the Petitioner because the appeals court sanctioned a decision by a lower court, which abused discretion and far departed from the accepted decisions of the appeals courts and this Court.

Specifically, Respondents misrepresented matter in the Respondents' Opposition arguing at 6 ¶2: "Notably, petitioner does not claim that the court relied on an erroneous legal standard, but rather that it erred in its assessment of petitioner's evidence, ..." contrary to the writ of certiorari identifying legal standards set by this Court and the decisions of the appeals courts. Thus, Petitioner clearly showed in the writ of certiorari at 7 that the lower court relied on erroneous legal standard, contradicted and far departed from the appeals court decision made in *Mauro v. Southern New England Telecomms.*, Inc., 208 F. 3d at 387 (2d Cir. 2000): "requiring the plaintiff to show that he or she applied for the specific jobs at issue would be unrealistic as an employee by definition cannot apply for a job that he or she does not know exists" when Defendants deceived or misled Petitioner about the VA CAR 02-0074 in an effort to conceal a promotion opportunity and to deny Petitioner promotion as part of continuous discrimination on bases of age, national origin and in reprisal for participation in protected activities.

In addition, Petitioner identified direct evidence of intentional discrimination, desperate treatment, and retaliation against Petitioner when Defendant Fowler provided information about the VA CAR-02-0074 to the 38-years old selectee while on the very same day on September 20, 2002, denied such timely information to the 47-years old

Petitioner by explicitly telling Petitioner "to request this type of information" from EEO office "since you have an ongoing EEO case" when the selectee and Petitioner requested information about the available vacancy announcements. See Exhibit (Ex.) 1 at E2. The direct evidence showed that Defendant Fowler was aware about the vacancy CAR-02-0074 on September 20, 2002; however, she intentionally denied vacancy announcement to Petitioner and did not post this vacancy until the day it closed on 9/24/02 in an effort to conceal a promotion opportunity from Petitioner and to cover up fraud with promotion, which was under a "name request" announcement for only one person to be on the certificate considered by the selecting official. In fact, Defendant Fowler already knew and admitted to Goldman that VA CAR-02-0074 was a name request vacancy "posted for reasons I can not will not go into at this time" and "Only one person will even be considered" in response to Goldman's warning that "posting it like this may be worst than not posting it at all, and may lead to major whining", "[t]his is the type of thing our employees constantly complain about" if "we don't even go through the motions ...". See Ex. 2 at E4-E5. The appeals court sanctioned a departure of the lower court from accepted decisions that was in conflict with the court's own decision in *Williams v. Giant Food Inc,* 370 F.3d 423 (4th Cir. 2004), which reversed the district court's summary judgment concluding that *Williams* created a genuine issue of material fact relevant to her failure-to-promote claims and can establish a *prima facie* case if she can show that she was unaware of the promotion opportunities because the company did not follow its own policy. Respondents' deceptions,

intentional misrepresentations, and dishonesty should be interpreted as affirmative evidence of guilt; however, the district court opinions were in obvious conflict with the relevant decisions of this Court (*Reeves*, 530 U.S. at 149) and decisions of the appeals courts. The facts and arguments for an exercise of this Court's supervisory power and decision to vacate the appeals court decision were presented in the Petitioner's writ of certiorari, which should be granted.

DIRECT EVIDENCE OF DISCRIMINATION AND RETALIATIONS

Respondents continued to misrepresent matter in the Respondents' Opposition with regard to direct evidence of discrimination and retaliations arguing at 7: "petitioner relied on that very same email message in his first lawsuit, where he also claimed that the email was direct evidence of age discrimination" wrongly contending that "petitioner is precluded from arguing that the email is direct evidence of discrimination a second time around" by substituting the evidence with "a finality as to the claim or demand in controversy". Also, Respondents' argument that the district court in the first lawsuit held that the email did not constitute direct evidence of discrimination and the Fourth Circuit affirmed the dismissal was without merit because the unpublished opinions are not binding precedent in this circuit in addition to the evidence that the district court decisions were based not on facts and the rule of law, but on deceptions, fraudulent assertions, deliberate misrepresentations, and criminal conduct of individuals suborned by Defendant Caron during administrative processing of the Plaintiff's EEO discrimination complaints.

Furthermore, the notion that the events surrounding an adverse employment action are not relevant evidence that a plaintiff could use at trial was clearly rejected by this Court and the appeals courts because they may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue. See e.g. *Stewart v. Rutgers, The State Univ.*, 120 F.3d 426, 433 (3d Cir. 1997); *United Air Lines v. Evans*, 431 U.S. 553, 558 (1977).

As established in the petition for a writ of certiorari, the district court abused discretion and ignored direct evidence of discriminatory attitude expressed in the email of the selecting official about "real paucity of employees in the 26 to 36 years age bracket," distress of the selecting official for being above the average age of 44, and "need for fresh ideas and enthusiastic energy of new employees" by wrongly referring to a case which was different from the circumstances of continuous discrimination and retaliations in the current case. The direct evidence of discriminatory attitude because of Petitioners' age and a pattern and practice of age discrimination when Defendant King did not select or promote the most qualified Petitioner to a number of positions, but selected the youngest and the least qualified individuals, were sufficient to defeat summary judgment. In addition to the direct evidence of discriminatory attitude obvious to any reasonable mind, the undisputed evidence of a pattern and practice of age discrimination in a series of denied promotions and assignments to the positions leading to promotion established disparate treatment and created an inference of age discrimination against Petitioner because promotions under the "accretion of duties" were unknown to Petitioner and were

made secretly in violation of the agency own regulations specifically requiring that "[t]he potential for future promotion must be made known to all potential applicants". An individual plaintiff may "use evidence of a pattern or practice of discrimination to help prove claims of individual discrimination within the McDonnell Douglas framework." *Lowery v. Circuit City Stores, Inc.*, 158 F.3d at 760-61 (4th Cir. 1998). The appeals court did not address any of the issues raised by Petitioner in the writ of certiorari and, consequently, the petition for a writ of certiorari should be granted.

However, Respondents misrepresented matter in the Respondents' Opposition with regard to a pattern and practice of age discrimination in a series of secret promotions of younger employees under the pretext of 'accretion of duties' by arguing at 7: "Such assertions cannot defeat a properly supported motion for summary judgment" contrary to the evidence showing that Defendants' motion was based on deliberate misrepresentations and deceptions, similar to what Respondents proffered to this Court. To deceive this Court, Respondents quoted the district court wrong opinion at A12 that petitioner's "arguments [were] based on his own conspiratorial theories and conclusory leaps in reasoning rather than evidence," which was irrelevant and immaterial to the issue of a series of secret promotions by 'accretion of duties' to conceal a promotion opportunity from Petitioner, but related to "[defendant's] state of mind and motivation [which] are in dispute". However, the district court abused discretion and denied jury trial that clearly warrants vacating the appeals court decision and granting the Appellant's petition for a writ of certiorari.

Furthermore, Petitioner presented direct evidence of conspiracy to escalate discrimination and retaliations against Petitioner when on September 30, 2002, Defendant Jebsen instructed his subordinate Defendant Smith: "It's time to crack down on them [Petitioner and his brother]... Dave Caron has mentioned it twice now" after Defendant Caron informed them on September 27, 2002, that Petitioner "has filed an additional 14 complaints, alleging reprisal" and "alleg[ing] that we deliberately damaged the OCI investigation by delay and by not giving them information that they asked for and by not giving them complete list of promotions." See Ex. 3 at E7-E8. The direct evidence of conspiracy and demonstrably discriminatory motive to retaliate against Petitioner was further supported by the undisputed evidence when Petitioner's supervisor Craun informed Defendant Smith that Petitioner "in fact is getting the work done despite the claim below. He is usually in the office past 6:00 PM so that might explain why he is sending emails in the afternoon." See Ex. 4 at E9-E10.

Nevertheless, Respondents deliberately misrepresented matter in the Respondents' Opposition at 8 to deceive the Court with respect to the September 30, 2002 email "to crack down" on petitioner and his brother: "that the supposed 'crack down' concerned petitioner's excessive use of official government time and resources to work on his multitude of Equal Employment Opportunity (EEO) complaints" and "[t]he alleged 'crack down' was merely the Navy's effort to enforce reasonable restrictions on petitioner's use of official government time" contrary to the direct evidence that Respondents conspired to escalate discrimination

and retaliations against Petitioner for filing EEO discrimination complaints when Petitioner used his own time to work on EEO discrimination complaints, but Defendant Caron maliciously fabricated "concern" for "excessive use of official government time" and conspired with other Defendants to "limit the official time petitioner could spend on his EEO complaints." See Ex. 4 and Ex. 3. Under such circumstances, Respondents' conduct amounts to fraudulent misrepresentations and deliberate deception to the Court in the Respondents' Opposition at 8. As shown above, Respondents continued deceptions and misrepresentations of substituting the direct evidence by "finality as to the claim or demand in controversy" in the first lawsuit to deny Petitioner the direct evidence of the Respondents' conspiracy and demonstrably discriminatory motive to escalate discrimination and retaliations against Petitioner for participation in protected activities in addition to the evidence that the district court decisions were based not on facts and the rule of law, but on deceptions, fraudulent assertions, material misrepresentations, and criminal conduct of individuals suborned by Defendant Caron. Moreover, when only a short period of time separates an aggrieved employee's protected conduct and adverse employment actions, such temporal proximity provides an evidentiary basis from which an inference of retaliation can be drawn. See *Kachmar v. SunGard Data Sys., Inc.*, 109 F.3d 178 (3d Cir. 1997). In this case the appeals court did not address any of the issues raised by Petitioner, but sanctioned erroneous decisions and departure of the lower court from the accepted decisions that call for an exercise of this Court's supervisory power.

Accordingly, the petition for a writ of certiorari should be granted.

The evidence identified in this case showed that the district court abused discretion and far departed from the accepted decisions since "direct evidence would be what [the selecting official] said or did in the specific employment decision in question." See *Plair v. E.J. Brach & Sons, Inc.*, 105 F.3d 343, 347 (7th Cir. 1997). Respondents, however, continued deliberate misrepresentations and deceptions in the Respondents' Opposition at 10 contrary to the Petitioner's writ of certiorari presenting direct evidence of discrimination and retaliations against Petitioner and this Court's decision that in the "mixed-motive" cases direct evidence of retaliation is sufficient to show that the defendant's activity was motivated by retaliatory animus. See *Desert Palace Inc. v. Costa*, 539 U.S. 90 (2003). In addition, Petitioner presented direct evidence of the Respondent's intent to continue intentional discrimination and retaliations against Petitioner and his brother when Defendant Jebsen replied: "I don't like the sound of mediation; implies we have some grounds for compromise" in response to a request for participation in mediation. Furthermore, an offer of promotion to the Head of Electromagnetic Signatures Department position for Petitioner further evidenced Petitioner's superior qualifications. See Ex. 5 at E10 and E11. However, the district court abused discretion and far departed from this Court's findings and specifically that an employee's claimed superior qualifications for the position sought could show that the employer's articulated reasons were pretextual. See *Ash v. Tyson Foods, Inc., 126 S. Ct. 1195* (2006). The appeals court failed to address the

district court's abuse of discretion and the issues raised by Petitioner; consequently, the petition for the writ of certiorari should be granted.

CONCLUSION

Wherefore, in consideration of the above, Petitioner respectfully submits response to the Respondents' Opposition to the petition for a writ of certiorari for the Court's consideration and decision to grant the petition. Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Date
June 14, 2009

Yuri Stoyanov
Yuri Stoyanov

EXHIBITS

TABLE OF EXHIBITS

EXHIBIT 1

Josie,

Please reply by September 25, 2002. Thank you.

Yuri

-Original Message----------
From: Stoyanov Yuri J CRBE
Sent: Friday, September 20, 2002 2:36 PM
To: Mcgrath Josephine CRBE
Cc: Fowler Mary K (Kathy) CRBE
Subject: RE: Report on the Vacancy announcements in C/70

Josie,

Please advise me on this matter. Do I have to call the EEOC Administrative Judge for the release of this information or you can request the Code 70 to release this information to me?

Please let me know if you have questions. Thank you.

Yuri Stoyanov
Tel: 301-227-2556

-Original Message----------
From: Fowler Mary K (Kathy) CRBE
Sent: Friday, September 20, 2002 1:02 PM
To: Stoyanov Yuri J CRBE
Subject: RE: Report on the Vacancy announcements in C/70

Yuri,

It is my understanding that you must request this type of information from Josie Mcgrath in the EEO office since you have ongoing EEO case.

Sorry,
Kathy.

-Original Message----------
From: Fowler Mary K (Kathy) CRBE
Sent: Friday, September 20, 2002 8:52 AM
To: Van Der Veer Susan C CRBE
Subject: RE: announcement

Sue,

I can actually call up the announcement this morning. Will attach the website.

Kathy

www.donhr.mavy.mil

-Original Message----------
From: Stoyanov Yuri J CRBE
Sent: Tuesday, September 17, 2002 10:36 PM

To: Fowler Mary K (Kathy) CRBE
Subject: Report on the Vacancy announcements in C/70

Kathy,

Please inform me on the status of vacancy announcements to ND-V position in Code 70 and Code 74 in particular. Please let me know when and if any vacancy announcements for the branch head or other positions have been released since June 2002 to the end of the FY02? Thank you.

Yuri Stoyanov
Tel: 301-227-2556

-Original Message----------
From: Van Der Veer Susan C NSSC [mailto:VanDerVeerSC@NAVSEA.NAVY.MIL]
Sent: Monday, September 16, 2002 7:39 PM
To: Fowler Mary K (Kathy) CRBE; King James H CRBE
Subject: announcement

Kathy/Jim:

Are you expecting the 05T position to get announced this week?

Thanks, Sue

EXHIBIT 2

-Original Message-
From: Fowler Mary K (Kathy) CRBE,
Sent: Wednesday, September 25, 2002 2:21 PM
To: Goldman Kenneth R CRBE

Subject: RE: Vacancy announcement

Ken,

This was posted for reasons I can not will not go at this time. [emphasis added]
Funny how Jenkins regularly deletes our emails but managed to see this one on the public folder that most employees don't even look at.

-Original Message-
From: Goldman Kenneth R CRBE
Sent: Wednesday, September 25, 2002 9:15 AM
To: Fowler Mary K (Kathy) CRBE
Subject: RE: Vacancy announcement

Thanks Kathy, I think you are quite competent. Everything you say may be true, but if we don't even go through the motions, folks will complain (and you know who the usual suspects are). Posting it like this may be worst than not doing it at all, and may lead to major whining by those suspects. [emphasis added]

KG

Ken Goldman
Head, Signatures Characterization & Analysis
Department (Code 7100)
David Taylor Model Basin
aka Naval Surface Warfare Center Carderock Division
W. Bethesda, MD 20817-5700
goldmankr@nswccd.navy.mil
<mailto:goldmankr@nswccd.navy.mil>
301-227-4239 (Voice)
301-227-5425 (Fax)

202-236-9116 (Cell)

-Original Message-
From: Taylor Dianna J CRBE, **On Behalf of Fowler Mary K (Kathy) CRBE**
Sent: Wednesday, September 25, 2002 2:21 PM
To: Goldman Kenneth R CRBE
Subject: RE: Vacancy announcement

Because I'm not as competent as you Ken! This is a name request announcement. Only one person will even be considered. [emphasis added]
K.

-Original Message-
From: Goldman Kenneth R CRBE
Sent: Tuesday, September 24, 2002 6:57 PM
To: Fowler Mary K (Kathy) CRBE
Subject: RE: Vacancy announcement

This doesn't really help folks who may want to apply if it isn't posted until the day it is closed. This is the type of thing our employees complain about. Why wasn't it posted last week when Roslyn sent it to you? [emphasis added]

KG

Ken Goldman
Head, Signatures Characterization & Analysis Department (Code 7100)
David Taylor Model Basin
aka Naval Surface Warfare Center Carderock Division
W. Bethesda, MD 20817-5700

goldmankr@nswccd.navy.mil
<mailto:goldmankr@nswccd.navy.mil>
301-227-4239 (Voice)
301-227-5425 (Fax)
202-236-9116 (Cell)

-Original Message-
From: Taylor Dianna J CRBE On Behalf Of Fowler Mary K (Kathy) CRBE
Sent: Tuesday, September 24, 2002 8:43 AM
To: Directory 70 – Announcements
Cc: Bowen Ronald J NSSC; Boyd James B Jr. NSSC; Clark Donald T CRBE; Coughlin Glenn H NSSC; Cowan Michael N CRBE; Fast Steve J CONT NSSC; Hyman Martin A NPRI; Jenkins Shawn Q NSSC; Joseph Vignalli; Karen Beer; Mark Mcgown; Michael O'Leary; Pope Marion F NSSC
Subject: Vacancy announcement

From: Johnson Roslynn H CRBE
Sent: Monday, September 16, 2002 6:01 PM
To: announcement

Kathy,

The High grade ND-5 Program Manager for 743 opens 09-17-02 closes 09-24-02
Announcement # CAR-02-0074.

Roslynn

EXHIBIT 3

From: Jebsen Gary M CRBE
Sent: Monday, September 30, 2002 7:07 AM
To: Smith Gerald A CRBE

Subject: FW: EEO Complaints: Stoyanov

It's time to crack down on them vis a vis hours spent on their EEO staff. Dave Caron has mentioned it twice now: What do you recommend? Meeting with Wilson, Shang?
Gary

-Original Message-
From: Caron David M CRBE
Sent: Friday, September 27, 2002 6:40 AM
To: Petri Steven W CAPT CRBE; Jebsen Gary M CRBE; Fowler Mary K (Kathy) CRBE, Hagberg Chris L CRBE; Tryon Stephen MS CRBE; Smith Gerald A CRBE; Tomlin John C CRBE; Mcgrath Josephine M CRBE; Farley Stephen M CRBE; Davies John C III CRBE
Subject: EEO Complaint: Stoyanov

FOR OFFICIAL USE ONLY, DO NOT DISSEMINATE.

THIS IS A PRIVILEGED DOCUMENT, PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE, THE ATTORNEY WORK PRODUCT PRIVILEGE, OR OTHER APPLICABLE PRIVILEGES. THIS DOCUMENT MAY NOT BE RELEASED BY ANYONE OTHER THAN THE ADDRESSEE(S) OR THE COPY ADDRESSEE(S) TO PERSONS OR ORGANIZATION NOT HAVING THE REQUISITE NEED-TO-KNOW, WITHOUT THE CONSENT OF THE NSWC CARDEROCK DIVISION, OFFICE OF COUNSEL.

I just wanted to let people to know that Mr. Yuri Stoyanov has filed an additional 14 complaints, alleging reprisal against:
Mr. G. Smith (4 complaints)
Ms. M. Fowler (2 complaints)
Mr. G. Gebsen (3 complaints)
Mr. D. Caron (2 complaints)

Capt. S. Petri (3 complaints)

He alleges that we deliberately damaged the OCI investigation by delay and by not giving them information that they asked for and by not giving them complete list of promotions. The complaints are essentially the same for each of us.
For information sake, we provided all the information that OCI Investigator requested and more. We also provided copies of what was provided to the OCI Investigator to the complainant for his review at least a day before the investigation in accordance with the Investigator's letter. In addition we have no obligation to respond directly to the Complainant in requests that he makes for information (unless of course made under FOIA, or Privacy Act). We advised him that we would provide information directly to Investigator and that he should make requests directly to her if he wanted something included.
With the number of complaints and e-mails they are sending at all hours of the day, I can't believe they are working. The EEO calls for a reasonable amount of time to work on drafting their complaint and I have seen cases that indicate limit it to 8 hours total is reasonable. I would not be surprised to if they spend 8 hours a day on EEO. I would be willing to discuss this with their immediate supervisors and HR if a problem with their completing work is perceived.
In regard to complaints we will deal with it.

Dave.

EXHIBIT 4

From: Craun Matthew A CRBE
Sent: Monday, November 04, 2002 8:52 AM

To: Smith Gerald A CRBE; Shang Paul C CRBE
Subject: RE: Calibration of Yuri

Jerry,

I spoke with Yuri on Friday and he agreed. I'm following up with an email today. As for Yuri's work, he in fact is getting his work done despite the claim below. He is usually in the office past 6:00 PM so that might explain why he is sending emails in the afternoon.

Matt

-Original Message-
From: Smith Gerald A CRBE
Sent: Thursday, October 31, 2002 1:15 PM
To: Shang Paul C CRBE; Craun Matthew A CRBE
Subject: FW: Calibration of Yuri

Yuri needs to have some bounds set for him. See me and I will help define the bounds but you need to issue ASAP.

Jerry Smith
Deputy Head, Signatures Directorate
301-227-1626

-Original Message-
From: Caron David M CRBE
Sent: Thursday, October 31, 2002 1:12 PM
To: Jebsen Gary M CRBE; Smith Gerald A CRBE

Subject: Calibration of Yuri

FOR OFFICIAL USE ONLY, DO NOT DISSEMINATE.

THIS IS A PRIVILEGED DOCUMENT, PROTECTED BY THE ATTORNEY CLIENT PRIVILEGE, THE ATTORNEY WORK PRODUCT PRIVILEGE, OR OTHER APPLICABLE PRIVILEGES. THIS DOCUMENT MAY NOT BE RELEASED BY ANYONE OTHER THAN THE ADDRESSEE(S) OR THE COPY ADDRESSEE(S) TO PERSONS OR ORGANIZATION NOT HAVING THE REQUISITE NEED-TO-KNOW, WITHOUT THE CONSENT OF THE NSWC CARDEROCK DIVISION, OFFICE OF COUNSEL.

FYI

I am receiving extremely long nonsensical stuff from him daily (middle of the work day), he must not work. I would suggest that he be given designated hours to work on EEO matters like Alex was. If you would like to see the latest or talk. I will be here tomorrow.

Thanks, Dave

EXHIBIT 5

From: King James H CRBE
Sent: Monday, July 29, 2002 2:42 PM
To: Jebsen Gary M CRBE
Cc: Smith Gerald A CRBE; Davies John C III CRBE
Subject: RE: STOYANOVS

Gary:
Thanks. I'll let Dave know that you're willing to do it and schedule some time with you and Jerry. I agree that we've got no basis for compromise but, thought that it might be helpful to talk. Dave thought that we might be able to offer something to them.

If you're suggestion with Dr. Lakoudis goes through, you could offer them my position. [emphasis added]

Thanks, Jim

-Original Message-
From: Jebsen Gary M CRBE
Sent: Monday, July 29, 2002 2:02 PM
To: King James H CRBE
Cc: Smith Gerald A CRBE; Davies John C III CRBE
Subject: RE: STOYANOVS

If a fresh face is warranted, then it probably should be me. Jerry will be construed to be part of the perceived problem. It so happens that I have both of those days available. I would like to sit down with you and Jerry beforehand and review the facts. I don't like the sound of mediation; implies we have some ground for compromise. Don't know what we would concede at this point. [emphasis added]

Gary

-Original Message-
From: King James H CRBE
Sent: Monday, July 29, 2002 2:42 PM
To: Jebsen Gary M CRBE
Cc: Smith Gerald A CRBE; Davies John C III CRBE
Subject: STOYANOVS

Gary,

You are aware of the issue with the Stoyanovs and my alleged discrimination against them. Dave Caron (Legal) suggested mediation and I agreed to mediation with Aleks on 21 August and Yuri on 22 August. In conversation with Dave, he suggested that we might want to "go one step higher". This would provide a fresh face -- someone when they might feel confident was not out to get them. To me, that would mean you or Jerry. I don't know whether either one of you could take the time, would be interested, or fell up to speed on the issues.

What do you think?

Jim
James H. King
Head, Electromagnetic Signature Department, Code 74
9500 MacArthur Boulevard
NAVSEA, Naval Surface Warfare Center, Carderock Division
West Bethesda, MD 208170-5700
(301) 227-1311; FAX: (301) 227-2539